Supreme Court, U.S.
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No. 99-___

In The

Supreme Court of the United States

KATHRYN I. BLANKENSHIP,

Petitioner,

v.

The Honorable ALAN A. McDONALD,
United States District Court Judge, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KATHRYN I. BLANKENSHIP, Plaintiff,

v.

THE HONORABLE ALAN A. McDONALD, United States District Court Judge, Eastern District of Washington, personally, and the marital community composed of ALAN A. McDONALD and RUBY K. McDONALD; JAMES R. LARSEN, Clerk, United States District Court, Eastern District of Washington, personally, and the marital community composed of JAMES R. LARSEN and L. DIANNE EMMONS, Defendants.

No. CY-97-3019-FVS

OPINION

(Filed August 22, 1997)

PANNER, J.

Plaintiff Kathryn I. Blankenship brings this employment discrimination action against defendants Alan A. McDonald, United States District Judge for the Eastern District of Washington (Eastern District); Judge McDonald's wife, Ruby K. McDonald; James R. Larsen, Clerk of the Court for the Eastern District; and Larsen's wife, Dianne Emmons. Plaintiff, a former court reporter for Judge McDonald, claims that defendants retaliated against her for testifying at another employee's hearing.

Defendants move to dismiss for lack of subject matter jurisdiction and failure to state a claim. I grant the motion.

BACKGROUND

The following allegations are taken from plaintiff's complaint. Plaintiff was Judge McDonald's official court reporter from 1985 to 1995, first in Spokane and later in Yakima.

In February 1994, Christine Mearns, a former court employee, filed a complaint against the Clerk's Office, alleging sex and handicap discrimination. Mearns was granted a hearing under the Eastern District's Equal Employment Opportunity (EEO) Plan.

In July 1994, Chief Judge Justin L. Quackenbush presided over a hearing on Mearns's EEO complaint. Plaintiff testified after Chief Judge Quackenbush assured her that she should not fear retaliation and that her testimony would be confidential.

At the hearing, plaintiff testified that Judge McDonald edited her transcripts of hearings before filing and required her to make his changes while certifying that the transcripts were verbatim. Plaintiff testified that Judge McDonald required her to notarize improper signatures on personal documents; to draft incorrect and unauthorized reimbursement requests; to perform secretarial work for his private business on court time; and to conceal information during a government audit. Plaintiff also testified that Judge McDonald and his courtroom deputy clerk bothered plaintiff during court proceedings by exchanging notes with racist, insulting comments about attorneys and witnesses.

On the first working day after Mearns's hearing, Judge McDonald angrily confronted plaintiff about her

testimony. Afterwards, Judge McDonald and court staff ostracized plaintiff.

In November 1994, plaintiff was diagnosed with major depression and anxiety. She could not work.

On November 22, 1994, plaintiff received a negative performance report, which stated that she had missed deadlines for filing transcripts. Plaintiff contends that the missed deadlines were either excused, incorrectly computed, or caused by Judge McDonald's editing.

Larsen offered plaintiff a voluntary transfer from Yakima to Spokane, which plaintiff refused. In December 1994, Larsen wrote plaintiff that she would be transferred to Spokane on February 1, 1995, and that she would be on probation. Plaintiff remained on sick leave.

In February 1995, Larsen notified plaintiff by letter that he would recommend that the court terminate her. Plaintiff responded in writing that the stated reasons for terminating her were pretextual. By letter dated February 13, 1995, signed by Judges McDonald, Quackenbush, Wm. Fremming Neilsen, and Fred VanSickle, plaintiff was terminated effective March 3, 1995. Plaintiff did not file an EEO discrimination claim.

STANDARDS

The court should not grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no facts in support of the claim. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court should construe the complaint in the light most favorable to the plaintiff. *Rosen v. Walters*, 719 F.2d 1422, 1424 (9th Cir. 1983).

DISCUSSION

I. Bivens Claims

A. Standards

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court created a private right of action for damages against federal officials who violate a person's constitutional rights. *Walleri v. Federal Home Loan Bank of Seattle*, 83 F.3d 1575, 1583 (9th Cir. 1996). The Court has been cautious about creating new remedies under *Bivens*. *Id.* at 1584 (citing *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988)). "[W]here Congress has provided some mechanism for relief that it considers adequate to remedy constitutional violations, *Bivens* claims are precluded." *Moore v. Glickman*, 113 F.3d 988, 991 (9th Cir. 1997). " 'So long as Congress' failure to provide money damages, or other significant relief, has not been inadvertent, courts should defer to its judgment because "Congress is that body charged with making the inevitable compromises required in the design of a massive and complex . . . program." ' " *Brazil v. United States Dep't of Navy*, 66 F.3d 193, 198 (9th Cir. 1995) (quoting *Kotarski v. Cooper*, 866 F2d 311, 312 (9th Cir. 1989) (quoting *Chilicky*, 487 U.S. at 429)). *cert. denied*, 116 S. Ct. 1317 (1996).

B. Statutes and Rules Governing Plaintiff's Employment

I. Statutes

District courts appoint court reporters. 28 U.S.C. § 753(a). "Direct responsibility for the supervision of court

reporters rests with the district court." *In re Holloway (SECO Nevada, Inc. v. McMordie)*, 884 F.2d 476, 478 n.3 (9th Cir. 1989); 28 U.S.C. § 753(c) ("The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties. . . . "). Court reporters are employed by the district court en banc, not by individual judges. Admin. Office of U.S. Courts, *Court Reporters' Manual*, ch.3, at 1 (Oct. 1991) (vol. VI of *Guide to Judicial Policies and Procedures*).

Court reporters, like other judicial branch employees, are eligible for back pay if improperly terminated, 5 U.S.C. § 5596(a)(2); severance pay, 5 U.S.C. § 5595(a)(1)(E); per diem allowances, 5 U.S.C. § 5701(1)(D); part-time career options, 5 U.S.C. § 3401(1)(C), and subject to anti-nepotism rules, 5 U.S.C. § 3110(a)(1)(C).

The parties dispute whether plaintiff, as a judicially appointed court reporter, was a member of the "excepted service" under the Civil Service Reform Act of 1978 (CSRA) (codified as amended in scattered sections of 5 U.S.C.). I agree with defendants that plaintiff was in the excepted service.

"[T]he 'civil service' consists of all appointive positions in the executive, judicial, and legislative branches of Government of the United States, except positions in the uniformed services." 5 U.S.C. § 2101(1). "Excepted service" employees are "those civil service positions which are not in the competitive service of the Senior Executive Service." 5 U.S.C. 2103(a). Because plaintiff was a judicial appointee who did not fit the CSRA's definitions of competitive service or the Senior Executive Service, she was a member of the excepted service. *See Fagan v. Bingham*,

Civ. A. No. 94-11399-GAO, 1955 WL 791916, at *2 (D. Mass. Nov. 29, 1995) chief deputy clerk for bankruptcy court was a judicial employee, not in competitive service, and therefore in the excepted service under the CSRA); *Hartman v. Merit Sys. Protection Bd.*, 77 F.3d 1378, 1379 & n.3 (Fed Cir. 1996) (deputy clerk for a U.S. District Court was not in competitive service); *Garcia v. Williams*, 704 F. Supp. 984, 990 (N.D. Cal. 1988) (secretary to federal judge was in excepted service). Plaintiff is not an employee of the Administrative Office of the United States Courts. *See Hartman*, 77 F.3d at 1380 (deputy clerks are court personnel, not Administrative Office employees).

2. Court Reporter Management and EEO Plans

"In 1982, responding to abuses in court reporter services, the Judicial Conference recommended that circuit judicial councils require each district court 'to develop a court reporting management plan that will provide for the day-to-day management and supervision of an efficient court reporting service within the court,' and specifically assign supervision responsibilities. . . . If required, the plan must be approved by the circuit judicial council and filed with the Administrative Office. . . . " Federal Judicial Ctr., *Deskbook for Chief Judges of U.S. District Courts* 58 (2d ed. 1993) (citation omitted). The Eastern District's Management Plan for Court Reporting and Recording Services (Management Plan), adopted with the approval of the Ninth Circuit Judicial Council, provides that "[c]ourt reporters are employed by the court en banc and shall retain employment at the will of the court en banc regardless of the death, resignation or retirement of

an individual judge." Defts.' Mem. In Support, Appendix A, at 4.[1] The Management Plan also provides that "[d]iscipline and/or sanctions of reporters/recorders shall be pursuant to the provisions of this Plan and/or the Personnel Manual of the Court." *Id.* at 18.

The Eastern District's EEO Plan allows an employee to bring a discrimination complaint if the employee has been retaliated against for "serv[ing] as a . . . witness . . . in connection with a complaint." Defts.' Mem. in Support, Appendix B, Appendix 1, at 2. When an employee files a discrimination complaint, the EEO Coordinator may investigate the complaint and attempt to resolve it informally. The EEO Coordinator then prepares findings and recommendations describing the issues, the resolution, if any, and corrective actions.

A party may object to the EEO Coordinator's findings and recommendations and seek review from the Chief Judge (or the Chief Judge's designee). The Chief Judge must then decide whether to investigate further, interview the parties, or hold a formal hearing. If the Chief Judge determines that no hearings or interviews are necessary, the Chief Judge issues a final decision within forty-five days of the request for review.

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[1] The Eastern District's management plan for court reporters and its EEO Plan are not part of the pleadings. On a motion to dismiss, I "may take judicial notice of matters of public record outside the pleadings." *MGIC Idem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

If a formal hearing is held, the parties have the right to representation, to present evidence, and to cross-examine adverse witnesses. The Chief Judge must issue a final decision within thirty days after the hearing.

The EEO Plan does not authorize damages if an employee prevails on a discrimination complaint. However, the Back Pay Act allows judicial employees to receive back pay for adverse personnel actions determined by the "appropriate authority" to have been "unjustified or unwarranted." 5 U.S.C. § 5596(b)(1). Applying the Back Pay Act with the EEO Plan, a terminated judicial employee who prevails on a discrimination complaint "may be reinstated and awarded lost salary." *Fultz v. Waldron*, Civ. A. No. 93-891, 1994 WL 146361, at *4 (D. N.J. Apr. 19, 1994) (*Bivens* claim brought by deputy clerk at Bankruptcy Court precluded by combination of court's EEO Plan and Back Pay Act).

C. Discussion

Plaintiff's *Bivens* claims are precluded. Congress has given judicial employees benefits, such as back pay and severance pay, while withholding other benefits, showing that Congress's failure to provide a more complete set of remedies is not inadvertent. *Moore*, 113 F.3d at 993. In 1990, when Congress amended the Back Pay Act to cover judicial employees, the House Report on the bill noted, "While employees of the Administrative Office are already covered under existing law, the remaining employees of the judicial branch are not." H.R. Rep. 101-770(I), at 12, *reprinted in* 1990 U.S.C.C.A.N. 1709,

1717. This court should not create a remedy if Congress has chosen not to act. *See Moore*, 113 F.3d at 993.

The court noted in *Fultz* that Congress has shown a "constitutional deference" to the judicial branch, delegating authority to the Judicial Conference and Councils. *Fultz*, at *7. Congress created the predecessor to the Judicial Conference in 1922 to "serve as the principal policy making body concerned with the administration of the United States Courts." Admin. Office of U.S. Courts, *Judges' Manual*, ch. I, at 1 (Feb. 1988) (vol. III of *Guide to Judiciary Policy and Procedures*); 28 U.S.C. § 331. Congress created the Administrative Office and the judicial councils in 1939 because "it was determined that the courts themselves should play a central role in managing their affairs." *Id.*, ch. II, at 1; 28 U.S.C. § 332 (judicial councils).

When Congress created a separate statutory scheme for employees of the Administrative Office of the United States Courts, the House Report emphasized the need for the judicial branch to manage its employees independently:

> The Administrative Office is, to a large extent, currently subject to the control of the executive branch in personnel matters. The United States courts, which it serves, however, are mostly free of such Executive Branch supervision. The purpose of H.R. 4174 is to authorize the establishment of an independent, self-contained personnel management system within the Administrative Office which is free from executive branch controls and more similar to that of the rest of the judicial branch. While it may be convenient to have the personnel system of this agency covered by the personnel management

> network of the executive branch, it is contrary to the doctrine of separation of powers.

H.R. Rep. 101-770(I), at 5, *reprinted in* 1990 U.S.C.C.A.N. at 1710. "[C]ongressional deference may explain the dearth of legislative activity in this area concerning judicial personnel." *Fultz*, at *7.

Plaintiff cites *Garcia v. Williams*, 704 F. Supp. 984, 990-92 (N.D. Cal. 1988), which held that a legal secretary could bring *Bivens* claims against her employer, a United States district court judge. *Garcia*, however, was decided before Congress amended the Back Pay Act to include judicial employees. *See Fultz*, at *7 (distinguishing *Garcia*). More importantly, *Garcia* was decided before the Supreme Court held that the adequacy of existing remedies was not relevant to whether a *Bivens* action is precluded. *See Moore*, 113 F.3d at 994 (citing *Chilicky*, 487 U.S. at 423). "A finding of preclusion is premised only on an alternative scheme and some indication that Congress deliberately elected not to include complete relief." *Id.*

I recognize that the remedies available to plaintiff are incomplete compared to those that would be available in a *Bivens* action. Under the EEO Plan, the Chief Judge's decision on a discrimination complaint appears to be final, and the EEO coordinator's decision is not necessarily reviewable at a formal hearing. *Fultz*, at *10 n.11. Nevertheless, because Congress's failure to provide more complete remedies was not inadvertent, no *Bivens* action is available to plaintiff. *See Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (enactment of the CSRA "strengthens the

conclusion that *Bivens* remedies have no place in individual personnel disputes arising out of federal employment.").

II. Due Process Claims

Plaintiff claims that defendants deprived her of property and liberty interests protected by the Fifth Amendment.

A. Property Interest

For plaintiff to have a protected property interest in her employment, she "must show more than an expectation in continued employment; [she] must demonstrate a claim of entitlement to continued employment." *DiMartini v. Ferrin*, 906 F.2d 465, 467 (9th Cir. 1990). Plaintiff has no property interest in her employment because she served at the will of the Eastern District judges en banc. 28 U.S.C. §§ 753, 756; Management Plan at 4 ("Court reporters are employed by the court en banc and shall retain employment at the will of the court en banc"). *See Mareno v. Re*, 568 F. Supp. 17, 20 (S.D.N.Y.) (statute providing that federal judge's legal assistant "shall be subject to removal by the court" "is inimical to the concept of a property interest in employment by the court. Rather, the language is consistent with the concept of service at the pleasure of the court, and removal without cause."), *aff'd* 742 F.2d 1430 (2d Cir. 1983) (table). Chief Judge Quackenbush's alleged oral reassurance that plaintiff would not suffer retaliation for testifying cannot supersede the statutes and regulations governing the employment of court reporters. *See Bollow v. Federal Reserve Bank*, 650 F.2d 1093,

1099 (9th Cir. 1981) (bank officer's promise of employment security did not create an enforceable property interest because Federal Reserve Act of 1913 established employee's at-will status); *Williams v. McClellan*, 569 F.2d 1031, 1033 (8th Cir. 1978) (docket clerk for federal court had no protected property interest in employment).

B. Liberty Interest

"A person's liberty interest is implicated if a charge impairs [her] reputation for honesty or morality." *Erickson v. United States ex rel. Dep't of Health and Human Servs.*, 67 F.3d 858, 862 (9th Cir. 1995). A person may also have a protected liberty interest if she disputes the accuracy of charges leading to her termination and the defendants disclose the charges to the public. *Id.* To determine what process is due when the plaintiff has a protected liberty or property interest at stake, the court balances the risk of an erroneous deprivation, the government's interest in providing specific procedures, and the importance of the individual's interest. *Id.* at 863.

Here, defendants allegedly stated that plaintiff had missed filing deadlines for transcripts and had rejected a transfer to Spokane. Those alleged statements are not sufficiently stigmatizing to harm plaintiff's reputation for honesty or morality. *See Garcia*, 704 F. Supp. at 995 (plaintiff must show that stigma seriously damages reputation or significantly forecloses ability to obtain other work); *Sipe v. Fritz*, 43 B.R. 984, 994-95 (D. Ariz. 1984) (discharged deputy clerk for Bankruptcy Court had no protected liberty interest because the defendant's termination letter stated only that the deputy clerk had

managed her cases poorly and reassigned cases without court approval). Plaintiff also does not allege that defendants' statements were disclosed to the public. *See Sipe*, 43 B.R. at 994-95 (no liberty interest because the termination letter was not disclosed publicly).

Even assuming that plaintiff had a protected liberty interest at stake, her claim fails because she received all the process due her. Plaintiff was notified in writing of the allegations against her, allowed to respond in writing, and given the opportunity for a hearing. That was sufficient to protect her due process rights. *See Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996).

Plaintiff contends that a hearing would not have been before an impartial tribunal. However, she gives no reasons why the Chief Judge would be biased against her.

III. Claims Under 42 U.S.C. § 1985(2)

Plaintiff brings claims under 42 U.S.C. § 1985(2), alleging that defendants conspired to injure her because of her testimony at the EEO hearing. Plaintiff now concedes, however, that her section 1985 claim is not cognizable because she was not a party to the proceeding in which she testified. *David v. United States*, 820 F.2d 1038, 1040 (9th Cir. 1987).

IV. State Law Claims

Plaintiff brings state law claims against defendants for intentional infliction of emotional distress. Because plaintiff is in the excepted service under the CSRA, her state law claims are preempted. *Saul v. United States*, 928

F.2d 829, 840-43 (9th Cir. 1991). In *Saul*, the Ninth Circuit held that "[e]ven where the CSRA provided Saul no remedy, preemption of his work-related tort claims is necessary to fulfill congressional intent." *Id.* at 843.

Plaintiff contends that because she could make these claims even if she were still employed by the court or had voluntarily resigned, the claims are not related to her work. I disagree. I don't see how plaintiff's claims can logically be separated from her work. If plaintiff had not been a court reporter working for Judge McDonald, she would not have been subjected to his alleged misconduct.

CONCLUSION

Defendant's motion to dismiss (##) is granted.

DATED this 19th day of August, 1997.

OWEN M. PANNER
U.S. DISTRICT COURT JUDGE